No. 24-

IN THE

Supreme Court of the United States

PIERRE KORY, M.D., LE TRINH HOANG, D.O., BRIAN TYSON, M.D., PHYSICIANS FOR INFORMED CONSENT, A NOT-FOR-PROFIT CORPORATION, AND CHILDREN'S HEALTH DEFENSE, A NOT-FOR-PROFIT CORPORATION,

Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, REJI VARGHESE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA, ERIKA CALDERON, IN HER OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant this petition to resolve the widening conflict between the Ninth Circuit, which started in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *reh den*., 57 F.4th 1072 (9th Cir. 2023) (with vigorous dissents), *cert den*. 144 S. Ct. 33 (2023) (dis. opns. of. Thomas, J. & Alito, J.) and the Eleventh Circuit in *Otto v. City of Boca Ratan,* 981 F.3d 854 (11th Cir. 2020), *reh. den*., 41 F.4th 1271 (11th Cir. 2022) (with vigorous dissents). The conflict originally was whether physicians' speech which is the treatment is fully First Amendment protected per *Otto,* or categorically excluded from protection per *Tingley*. The conflict has been expanded by the Ninth Circuit in this case which stated that no speech by physicians to patients is protected because it is all incidental to medical care.

2. Is the lower courts' rule of law that all physician communications with patients are unprotected by the First Amendment consistent with or foreclosed by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*") and standard First Amendment content and viewpoint analysis. If foreclosed, does that make Respondents' interpretation of Business and Professions Code Section 2234(c) unconstitutionally overbroad?

3. If the speech in this case is fully protected, have the Respondents satisfied their strict scrutiny burden?

4. Have Petitioner physicians established their standing to challenge the Respondents' enforcement policy sanctioning so-called "Covid misinformation" and/or have the Petitioner organizations established standing to assert the right of patients to hear the information targeted by the Respondents under *Murthy v. Missouri*, 603 U.S. 43 (2024)?

CORPORATE DISCLOSURE STATEMENT

Physician for Informed Consent ("PIC") and Children's Health Defense ("CHD") are both non-profit organizations with no parent corporation or issuance of stock.

STATEMENT OF RELATED CASE PROCEEDINGS

The following federal decisions are directly related to the case before the Court:

Kory, et. al., v. Bonta et. al., Case No. 24-2946, non-published Ninth Circuit interlocutory decision dated November 27, 2024, reproduced at Appendix A, 1a-5a.

Kory, et. al., v. Bonta et. al., Case No. 2:24-cv-00001-WBS Decision dated April 22, 2024, reproduced at Appendix B, 6a-32a.

Kory, et. al., v. Bonta et. al., No. 24A670, Application for Stay or Injunction denied by Justice Kagan on January 21, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Pierre Kory, M.D., Le Trinh Hoang, D., Brian Tyson, M.D., Physicians for Informed Consent, and Children's Health Defense respectfully petition for a writ of certiorari to review the interlocutory decision of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Since early 2022, the medical and osteopathic medical boards of California (hereinafter jointly referred to as the "Board") with the assistance of the California Legislature has been threatening disciplinary actions against physicians for providing information and opinions to patients which depart from the Covid narrative issued by CDC and other public health authorities.

Petitioners are three California licensed physicians and two organizations who assert their First Amendment rights to provide such differing information and opinions to patients, as well as the right of patients to receive this information.

This petition arises from the Ninth Circuit's affirmance of the district court's denial of a preliminary injunction, which tersely upheld the district court's revival of the professional speech exception to First Amendment protected speech. Both lower courts held that all physician speech to patients is unprotected because it is incidental to medical care. However, this professional speech doctrine was specifically rejected the last time it was raised by the California Attorney General's office in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*),

The lower court decisions exacerbate the conflict with the Eleventh Circuit in *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), *reh. den.*, 41 F.4th 1271 (11th Cir. 2022) (with vigorous dissents), which recognizes broader protections for physician speech, even when the speech is the treatment.

The district court also held that Petitioners did not have as applied standing to bring the case, despite the fact that in a related case, it held that three of the five Petitioners had standing to challenge Assembly Bill ("AB") 2098 which was another part of the Board's program to stop the same physician speech. The panel majority's affirmation of the district court's standing decision is inconsistent with this Court's recent decision *Murthy v. Missouri*, 603 U.S. 43 (2024), as the Petitioners have at least the standing as the plaintiffs in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and there is an abundance of case law finding standing for challenges to government policies. Practically speaking, the panel's decision on standing most likely ends this case except for intervention by this Court.

Finally, the other important factor in favor of granting this petition is that California's campaign targeting protected professional speech is part of a national program initiated by the Federation of State Medical Boards (the "Federation") to suppress physicians across the country from providing patients with dissenting information. Although the current campaign is limited to the recently ended Covid-19 pandemic, it could be and most likely will be activated by some of the same players in the next public health crises. Clarifying the law on physicians' speech to

patients prior to what comes next, is surely worthy of the Court's attention.

OPINIONS BELOW

The decision of the court of appeals is reprinted at Appendix (App.") A and the district court's opinion is at Appendix B.

JURISDICTION

The court of appeal's decision sought to be reviewed in this case was entered on November 27, 2024. This petition is being filed on or before February 25, 2025, which is within 90 days of the date of the decision and entry, as required by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Business and Professions Code Section 2234 provides in relevant part:

> The board shall take action against any licensee who is charged with unprofessional conduct.

In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

. . . .

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

. . . .

STATEMENT OF THE CASE

A. California's Covid Misinformation Campaign

California's combined executive and legislative campaign threatening California physicians with professional discipline for their viewpoint speech contrary to the mainstream Covid narrative was precipitated by a short press release issued by the Federation on July 29, 2021. The press release invited its member medical boards throughout the country to sanction physicians for spreading "Covid misinformation" and "disinformation" to the public and patients. Verified Complaint, hereinafter "Complaint" at Ninth Circuit Dkt. No. 3, Excerpts of Record, pages 107-108, para. 63 (hereinafter "ER" followed by the page number).

In February 2022, the medical board's president, Kristina Lawson, announced at its public meeting that the medical board would be implementing the Federation's policy and would sanction physicians for "Covid misinformation." ER 108, para. 64-65. This was a direct threat intended to chill and censor what information California physicians provide to their patients.

A few days later, the California Legislature introduced AB 2098, adding a new disciplinary provision specifically making disseminating Covid "misinformation" to the public and patients a board disciplinable offense. ER 109, para. 66. AB 2098 also specifically references the Federation's press release as a rationale. *Id.* The bill was passed and scheduled to become effective on January 1, 2023 as Business and Professions Code Section 2270. *Id.* at para. 68.

However, after AB 2098 was signed into law, but before it went into effect, multiple federal lawsuits were filed. ER 109 at para. 70 & n.10. *Hoang v. Bonta*, one of the four cases, was filed by Petitioner's counsel and had three of the five Petitioners herein as plaintiffs (Petitioners Dr. Hoang, Physicians for Informed Consent ("PIC") and Children's Health Defense ("CHD")). Two of the three Respondents herein were defendants in *Hoang*. *Id.* at para. 70.

In the first filed case, a central district judge denied a preliminary injunction on both First and Fifth Amendment grounds. *Id*. at n.10 & *McDonald v. Lawson,* 2022 WL 18145254 (C.D. Cal. 2022). In the second and third filed cases, however, by order dated January 23, 2023, Eastern District Judge William B. Shubb issued a preliminary injunction against Section 2270 on Fifth Amendment vagueness grounds in the two related cases, *Hoang v. Bonta* and *Hoeg v. Newsom*. *Id*. para. 70, and 652 F. Supp. 3d 1172 (E.D. Cal. 2023).

Of significance to Petitioners' standing, Judge Shubb engaged in an extensive standing analysis and ruled that all plaintiffs in both related cases had met the relaxed pre-enforcement standing requirements. *Hoeg*, 652 F. Supp. 3d at 1182-84. The standing allegations of the three common plaintiffs in *Hoang* are virtually identical to the standing allegations in the complaint in this case for the three common Petitioners.

Also, the same speech was targeted by the Defendants/Respondents and sought to be protected by the plaintiffs in both *Hoang* and Petitioners in this case, to wit, so-called "Covid misinformation" to patients. The only difference

between *Hoang* and this case is the statutory basis of authority; Section 2270, which specifically targeted "Covid misinformation" in *Hoang,* versus the general standard of care provision in Section 2234(c) in this case. Complaint, ER 95, paras. 3-4.

B. The Legislature Makes a Tactical Retreat and the Medical Board Pivots Back Its Standard of Care Authority to Target AB 2098/Section 2270 Protected Speech

In September 2023, the Legislature passed SB 815 which, *inter alia*, repealed Section 2270, effective January 1, 2024. ER 109, para. 71. However, the initial reporting of the repeal quoted Section 2270's sponsor's spokesman as stating that, "Fortunately, with this update, the Medical Board of California will continue to maintain the authority to hold medical licensees accountable for deviating from the standard of care and misinforming their patients about COVID-19 treatments." *Id*. at 110, paras. 72-73. (A copy of the article in which the statement was reported is attached to Appellants' Motion to Supplement the Record, at Dkt. No. 9.) In addition, by December 2023, the Board had disciplined at least one physician for Covid misinformation under its standard of care authority. ER 113, para. 74 & ER 102, para. 21 to 103. (A copy of the statement of charges and the final disposition of that case is attached to Appellants' Motion for Judicial Notice, Dkt. No. 8.)

The announcement of Section 2270's upcoming repeal prompted the Ninth Circuit to order the parties in the *McDonald v. Lawson* and *Couris v. Lawson* consolidated appeals (Nos. 22-56220, 23-55069) to brief the issue of mootness. Judge Shubb did the same in *Hoeg* and *Hoang*.

Subsequently, the Attorney General's office moved to dismiss *Hoeg* and *Hoang* on mootness grounds.

The Ninth Circuit dismissed on mootness grounds the *McDonald* and *Couris* appeals. *McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024). Judge Shubb dismissed *Hoeg* and *Hoang* by order dated April 2, 2024. *Hoeg v. Newsom*, 728 F. Supp. 3d 1152.

C. Petitioners' Follow-up lawsuit

Because it was clear that the repeal of Section 2270 was not stopping the Respondents from targeting protected physician speech, on January 2, 2024 (and instead of opposing the Attorney General's motion to dismiss), the three *Hoang* plaintiffs together with two medical doctors (Pierre Kory M.D. and Brian Tyson M.D.) filed a new "follow-up" action (Complaint, ER 95, para. 3) to *Hoang* and *Hoeg,* which was accepted as a related case by Judge Shubb. ER 127, Dkt. Entry No. 4.

Instead of *Hoang*'s challenge to a bill/new statute, this lawsuit challenges the Respondents' enforcement "practice and policy" of investigating and sanctioning physicians for their protected speech to patients. It also asserts the right of patients (via organizational Petitioners PIC and CHD) to hear this speech. *Id.* ER, 112, para. 89 to ER 113, para. 95.

In addition, it is alleged that if the Respondents assert their statutory powers to enforce the "standard of care" as a defense, then such defense would render the statute overbroad. *Id.* at ER 116, para. 96. Contrary to the findings of both the district and appellate courts, Petitioners have

not alleged that the words of the standard of care statute (Bus. & Prof. Code § 2234(c)) are facially unconstitutional, or just that the statute as applied to the specific Petitioners are unconstitutional. Rather, the challenge is to the practice and policy of threatening and targeting physicians with discipline for providing information and recommendations contrary to the mainstream Covid narrative. This critical misreading of the Complaint by both courts may be a fatal flaw in both opinions.

D. The Petitioners and their Standing Allegations

1. Pierre Kory, M.D.

Pierre Kory, MD is a critical care doctor and at all relevant times, has a telehealth medical practice providing information and advice to patients, including California patients under his California medical license. Complaint, ER 99, para.18. As a leading expert on Ivermectin, Dr. Kory's consulting practice includes dealing with patients with questions about Ivermectin, and whether he recommends its use. *Id.* at para. 19. Dr. Kory has understandable concerns that the information and recommendations he provides to California patients could trigger a medical board disciplinary action. *Id.* at para. 21.

2. Le Trinh Hoag, D.O.

Dr. Hoang is a licensed pediatric osteopathic physician whose practice includes advising patients (and their families) about the risks versus benefits for Covid vaccines and continued boostering. *Id.* at ER 100, para. 24. The Complaint and her declaration provide context and details about the information she may convey to the

families, including some of the observations she has made since treating patients with Covid and those who have taken the vaccine. *Id.* at para. 24 to ER 101, para. 28; Hoang Decl. ER 81-84. As of the date of the Complaint, she intended to provide such information to families, regardless of whether her board might view this as Covid misinformation and subject her to board investigation and prosecution. Complaint, ER 101 at paras. 27-28 (thus satisfying the standing requirement of an intention to continue to act in what may be a violation of the Board's Covid misinformation enforcement policy).

Finally, Dr. Hoang is a member of Petitioner PIC (Hoang Decl., ER 82, para. 2, lns. 7-9) which membership may satisfy the required standing connection between her as a speaker and PIC members as listeners under *Kleindienst v. Mandel*, 408 U.S. at 762.

3. Brian Tyson, M.D.

Brian Tyson is a California licensed physician who owns a large urgent care clinic which has treated 20,000 plus Covid patients. Complaint, ER 101, para. 29; Tyson Decl., ER 86, para. 2. The Complaint and his Declaration details his observations made as a result of his clinic's experience, and sets out some of the information he tells patients and will continue to tell patients even if it may subject him to investigation and disciplinary proceedings. Complaint, ER 101, para. 30 to 102, para. 36. Decl. ER 86-87. Petitioner Tyson was previously investigated for over a year for alleged Covid misinformation to the public (Complaint, ER 102, para. 35), and thus has a reasonable concern or fear about further board action against him. *Id*. ER 102, para. 36.

4. Physicians for Informed Consent

Physicians for Informed Consent is a California not-for-profit corporation which advocates for the rights of physicians to provide evidence-based information concerning the risks and benefits of vaccines (Complaint, ER 102, para. 37) and to do so, it collects data from around the world, which information is sometimes at odds with the U.S. scientific consensus. *Id.* at para 38 to ER 105, para. 47. Many of its physician members are afraid to speak out against what the Covid narrative and CDC pronounces and what they believe to be an accurate risk profile from the vaccines and the boosters, as well as other issues, like the potential benefit of repurposed drugs like Ivermectin. *Id.* at 103, para. 40 to ER 104, para. 43. PIC asserts that their physician members' speech is being chilled by the Respondents' ongoing Covid misinformation censorship campaign. *Id.* ER 104, para. 43. The rights of PIC members are germane to its purpose, and such members (like Petitioner Hoang) would have standing to assert their individual rights. *Id.* at ER 104, paras. 43-46.

PIC also asserts the rights of its lay California members to hear the speech of Petitioner and other California physicians which could involve the physicians in disciplinable conduct. *Id.* ER 104 at para. 47, continuing to ER 105.

5. Children's Health Defense

Children's Health Defense is an education and advocacy not-for-profit organization whose mission is to end childhood health epidemics and which supports medical freedom, bodily autonomy and protect individuals'

rights to receive the best information available based on the physician's best judgment. *Id.* at ER 105, para. 48. CHD's members include California physicians who wish to provide information about booster shots and off-label drugs like Ivermectin, which information is or could be viewed as inconsistent with the mainstream Covid narrative. *Id.* ER 105 at para. 50, continuing to ER 106.

CHD has non-physician parent members who want to receive information like the information contained in the Complaint. *Id.* ER 105 para. 50, lns. 21-23. The Respondents' Covid misinformation enforcement program chills CHD's physician members and impairs its lay members from receiving such information. *Id.* ER 105 para. 51, continuing to ER 106. CHD sues in its own capacity and on behalf of its constituent members who have been and will continue to be adversely affected by Respondents' actions (*id.* ER 106, para. 52), and CHD satisfies the other requirements for associational standing. *Id.* ER 106 para. 53. As with Petitioner Hoang and PIC, Judge Shubb found these allegations sufficient for standing purposes in *Hoang. Hoeg v. Newsom,* 652 F. Supp. 3d at 1182-84.

E. The Information, Opinions and Recommendations at Issue in this Case

Petitioners submitted declarations from the three physician Petitioners (Kory, ER 76-80, Hoang, ER 81-84, Tyson, ER 85-87), the purpose of which is to give their perspective, and relate some of the information they wish to share with their patients, which information and perspective is at odds with what conventional medical put out to the public. Their declarations provide further

support for their standing, and specifically their plan to continue to provide information which may subject them to Board investigation and prosecution.

Also submitted was an extensive medical expert declaration (Verma Declaration, ER 39-75), which sets out many pages of sourced information which Petitioner physicians and other like-minded physicians might discuss with California patients. This declaration also presents the changes and problems with the consensus' thinking about Covid. Most importantly for this Petition, Dr. Verma relates that people do not have to pay for a medical visit to get a Covid vaccine, but rather seek out their doctors because:

> . . . they have questions and concerns about the safety and efficacy of the COVID-19 vaccines despite the public health media campaign extolling the benefits of the vaccines and their 'exceeding rare' side effect. . . . [and other issues which are not widely publicized.]
>
> [M]ost of my patients with cardiac complications after COVID-19 vaccination had not previously been educated on these risks underscores the material and sometimes fatal consequences of silencing doctors who engage in an ethically transparent and comprehensive risk-benefit analysis.

Id. at ER 40, para. 4, ln. 27 to ER 41, ln 12.

This supports Petitioner's core contention that this case is about information, opinions, and general

recommendations, not about the delivery of a medical intervention or treatment. It also shows the error of the both lower courts in trying to transform the case into sanctioning medical interventions.[1]

SUMMARY OF ARGUMENT

This petition raises two main substantive issues: First Amendment and standing.

A. The First Amendment Issue

This Court in *NIFLA* has expressly rejected what the lower courts have done in this case, which is to make all physicians speech to patients unprotected by transforming the speech to incidental to medical care. The lower courts' decisions further exacerbate the split between the Ninth and Eleventh Circuit on the First Amendment protection accorded to physicians' speech. Until this case, the conflict was only about when physicians' speech is the therapy. Now, the conflict has been extended to whether any speech to patients is protected. The *Kory* decisions say that none

1. The record also includes declarations from a patient of Petitioners Hoang and Kory. Debbie Hobel expresses concerns (as she did in her declaration in the *Hoang* case) about patients not trusting their physicians if they can be subjected to board sanction for providing information and opinions contrary to the public health authorities' dictates. Hobel Decl., ER 89, para. 2 to ER 90, para. 7. Neil Selfinger explains how he had been advised to take a second Covid shot after experiencing significant and continuing side effects from the first shot. Once Dr. Kory explained some of the underreported side effects, Mr. Selfinger was able to make a more informed decision. Selfinger Decl., ER 92, para. 1 to ER 93, para. 8.

of it is protected, while the Eleventh circuit in *Otto* holds that it is all protected.

In addition, both lower courts' decisions are inconsistent with what all prior Ninth Circuit authority has held, namely that speech to patients has at least some protection. More disturbingly, the result of these lower court decisions is that there is now a class of government operators who are exempt from the First Amendment, so long as they couch their restrictions or declare the speech to be covered by the standard of care, or part of medical care and treatment. Because the primary basis of the Ninth Circuit's order was on standing (albeit its standing analysis injected its flawed First Amendment analysis), it is unlikely that there will be further consideration of the First Amendment issue, not in the district court nor at the Ninth Circuit, which is a main reason for filing this petition at this time.

B. The Petitioners have Standing

Both the district and appellate court erred by misconstruing this case as a facial or as applied challenge to Section 2234(c). But this is a hybrid case which challenges the California government's multi-year, multi-pronged policy and program of threatening to sanction physicians for information and recommendations about Covid that conflict with the mainstream Covid narrative.

The specifically expressed purpose of this enforcement policy is to restrict what California physicians say to patients about Covid, by threatening them with disciplinary action. Historically, the program encompasses both the Board's announced policy, and specific legislation

passed but then repealed by the Legislature, after it had been enjoined. There is a long history of this Court finding standing for challenges to government policies, despite the fact that the statutory bases of the challenged policy are neutral, and even if the policy has not yet been applied to the plaintiffs.

In addition, both lower courts also failed to recognize that Petitioners demonstrated standing for the organizational Petitioners to hear the speech of physicians like Petitioner physicians under both *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 and *Kleindienst v. Mandel*, 408 U.S. 753, as recognized recently in *Murthy v. Missouri*, 603 U.S. 43.

Finally, this case is unlike most of the cases which reject standing. The state's program is part of a non-state actor's national campaign to cajole its state member boards throughout the country to disregard the First Amendment protections long accorded to professional speech. Some of the national media seems to be encouraging this constitutional infringement. This broader context presents an additional reason why the Court should take this case at this time.

REASONS FOR GRANTING THIS WRIT

I. CONTRARY TO THE LOWER COURTS' OPINIONS, THE PHYSICIANS' SPEECH TO PATIENTS INVOLVED IN THIS CASE IS FULLY PROTECTED

A. The Lower Court Decisions are Inconsistent with *NIFLA*

The starting point on physician speech to patients is this language from *NIFLA*:

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. *See, e.g.*, *King v. Governor of New Jersey,* 767 F.3d 216, 232 (C.A.3 2014); *Pickup v. Brown,* 740 F.3d 1208, 1227–1229 (C.A.9 2014); *Moore–King v. County of Chesterfield,* 708 F.3d 560, 568–570 (C.A.4 2013). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime. [citations omitted.] **"Professional speech" is then defined as any speech by these individuals** that is based on "[their] expert knowledge and judgment," *King, supra,* at 232, *or that is* ***"within the confines of [the] professional relationship,"*** *Pickup, supra,* at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. See *King, supra,* at 232; *Pickup,*

> *supra,* at 1253–1256; *Moore–King, supra,* at 569.
>
> But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals."

Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. at 767 (emphasis added).

There is, however, one significant constitutional distinction between *NIFLA* and this case. *NIFLA* involved content-only speech. This case involves viewpoint restrictions on speech, which this Court has held to be the most egregious form of content discrimination. *Rosenberg v. Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995), and *Matal v. Tam,* 137 S. Ct. 1744, 1763 (2017).[2]

Contrary to *NIFLA* (and the viewpoint restriction speech cases), the district court decided that all speech between a doctor and patient is excluded from First Amendment protection because " . . . when a doctor speaks in his capacity as the patient's treating physician and incident to his provision of medical care, the physician's words constitute medical care." (underscore in the

2. The Eleventh Circuit has noted that this Court implied that viewpoint regulation is a *per se* violation of the First Amendment. *Otto v. City of Boca Ratan,* 981 F.3d at 864.

Relatedly, according to the Ninth Circuit's *NIFLA* opinion, the only reason it did not apply strict scrutiny was because the compelled speech was not viewpoint based. *See Nat'l Inst. of Fam. & Life Advocs. v. Harris,* 839 F.3d 823, 836 (9th Cir. 2016).

original), App. B, page 16a, (hereinafter just the page number followed by "a"). There is no way to reconcile the district court's words and *NIFLA*. Therefore, the district court's decision must be seen as inconsistent with *NIFLA*.

The Ninth Circuit agreed with the district court's view by tersely stating that Section 2234(c) "does not purport to regulate speech unrelated to treating patients. . . ." 3a. Then, with equal terseness, it limits *NIFLA* to the "required communication of a particular message" (*id.*), *i.e.*, limiting *NIFLA* to compelled speech.

This attempt to distinguish *NIFLA* is unpersuasive, because while *NIFLA* was a compelled speech case, the prior cases *NIFLA* criticized for creating the exclusion from First Amendment protection (including *Pickup*), were not. Nor were the other cases *NIFLA* relied upon by this Court, like *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Thus, contrary to the Ninth Circuit's opinion, *NIFLA*'s rejection of the professional speech doctrine includes the expressive speech which is the subject of this action. This should be enough for the Court to accept this case and reverse the Ninth Circuit's affirmance of the district court's reinstatement of the professional speech exception to Free Speech.

B. The Lower Courts' Decisions Exacerbate the Conflict with the Eleventh Circuit.

The conflict between the two circuits started with their decisions about the constitutionality of prohibiting sexual orientation change therapy. In *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated on other grounds by NIFLA*, 585 U.S. 755 (2018), the Ninth Circuit held

that because the speech was the therapy, the speech was unprotected.[3]

Pickup was decided four years before *NIFLA,* and per the above, *NIFLA* very specifically criticized *Pickup* for unprotecting physician speech just because it is "*within the confines of* [*the*] *professional relationship*" *NIFLA,* 585 U.S. at 767.

Reviewing a similar sexual change therapy ordinance, and faithfully applying *NIFLA*, in *Otto v. City of Boca Ratan*, 981 F.3d 854 (11th Cir. 2020), *reh. den*., 41 F.4th 1271 (11th Cir. 2022) (with vigorous dissents), the Eleventh Circuit held that performing the same speech therapy as in *Pickup* was fully protected by the First Amendment and thus strict scrutiny applied.

The *NIFLA* based conflict was triggered by *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *reh den*., 57 F.4th 1072 (9th Cir. 2023) (with vigorous dissents), *cert den*. 144 S. Ct. 33 (2023) (dis. opns. of. Thomas, J. & Alito, J.). *Tingley* followed the result in *Pickup*, limited or underread *NIFLA,* and held that when the speech is the therapy, it is medical conduct and hence unprotected.[4]

---

3. It also set out a speech continuum theory with speech as treatment being unprotected, public speech being fully protected, and speech to patients (information and recommendations for treatment) being in the middle of the continuum, subject to intermediate scrutiny. *Pickup*, 740 F.3d at 1227-28.

4. "States do not lose the power to regulate the safety of medical treatment performed under the authority of a state license merely because those treatments are implemented through speech rather than through a scalpel." *Tingley*, 47 F.4th at 1064.

Thus, the conflict with respect to physicians' speech is when the physicians' speech does double duty as the actual treatment.

The district court and Ninth Circuit opinions in this case exacerbate this conflict because they hold that all physician speech to patients is now unprotected because it is all incidental to medical treatment or conduct (per pages 18-19 above).

C. The Lower Court Opinions are not even Consistent with Ninth Circuit Authority

In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), two district courts and the Ninth Circuit held that the information and recommendations about medical marijuana was fully protected speech, even though it would be illegal to write a prescription for the drug. As indicated, *Pickup* created a continuum approach to professional speech, moving the information and recommendation part of physicians' speech from *Conant*'s fully protected speech to the middle of the continuum, presumably subject to intermediate scrutiny. *Tingley* reads *NIFLA* as abrogating the "midpoint" of *Pickup*'s continuum (*Tingley*, 47 F.4th at 1074 & 1075), thereby reverting the information/recommendation speech back to the *Conant* rule of full protection/strict scrutiny. (It cannot be otherwise, since recategorizing these physician communications to patients as unprotected would obviously violate *NIFLA,* and *Tingley,* which purports to follow *NIFLA*.)

Accordingly, under *Conant* and *Tingley*, the district court and the Ninth Circuit should have found that strict

scrutiny applies to California's effort to regulate so-called Covid misinformation to patients. But they did not do so, which means that these decisions conflict with circuit authority. Since there were only a few Ninth Circuit judges who voted to rehear *Tingley* (*Tingley v. Ferguson,* 47 F.4th 1072 (9th Cir. 2023)), it seems unlikely that further lower court proceedings in this case will change minds at this Circuit, which further supports the granting of this Petition.

D. The Lower Courts' Adoption of Respondents' Interpretation of Section 2234(c) Makes the Statute Unconstitutionally Overbroad under NIFLA

In *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), the Court stated that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Both lower courts held that Section 2234(c) is not unconstitutional because it "does not purport to regulate speech unrelated to treating patients. . . ." *See* Page 18-19 *supra*. The decisions thus interpret Section 2234(c) to cover all speech by a physician to a patient.

However, in *NIFLA,* the Court rejected the professional speech doctrine, which proposes that all speech by physicians "within the confines of [the] professional relationship" is unprotected. *NIFLA*, 585 U.S. at 767. By making all communications by a physician to a patient unprotected speech incidental to medical care, the Respondents and both lower courts have applied Section 2234(c) in a real and substantial overbroad manner

under *Broadrick* as a matter of law, since *NIFLA* very specifically rejected the very principle that physician speech to patients is unprotected just because it is uttered "within the confines of [the] professional relationship. . . ." Therefore, based on *NIFLA,* the statute, as it is being interpreted, is unconstitutionally overbroad.[5]

II. ALL OF THE PETITIONERS HAVE STANDING

Both the district court and the Ninth Circuit adopted a far more rigorous standing approach than is permitted in First Amendment cases. Both courts also disregarded the pleaded facts which clearly established standing under First Amendment standing precedent. They both used an overly narrow frame of reference in this case which minimized the persistence which the California government has continued to threaten physicians for the protected speech. Most importantly, the decisions inject their erroneous First Amendment principle into their standing analysis, which itself may be sufficient for reversal, and may further support the Court taking this case.

The district court found that "The record is devoid of any evidence that the Boards have or may use their authority under Section 2234(c) to do anything other than regulate physician conduct, let alone discipline doctors for their protected speech in the manner plaintiffs suggest." 23a. This interpretation erroneously recategorizes

5. The Complaint raised overbreadth as an anticipated defense that Respondents had the statutory authority under Section 2234(c) to target the speech targeted by the repealed Section 2270. Complaint, ER 116, para 96. Petitioners argued overbreadth to both courts, but it was addressed by neither.

protected physician speech to patients as mere conduct. Similarly, the Ninth Circuit declared, "Section 2234(c) does not purport to regulate speech unrelated to treating patients" (3a), thereby improperly transforming all patient-related speech into unprotected incidental conduct.

Following this flawed legal framework, both courts imposed an unreasonably high burden of proof for establishing a credible threat. The Ninth Circuit's assertion that "Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies this test" (4a), fails to recognize the reality where such threats made at Board meetings, via a new law, a statement by the law's sponsor that despite its repeal the Board will continue to investigate doctors, and at least one proceeding resulting in a license surrender, severely chills protected speech.

These facts satisfy standing in a case like this where the First Amendment violation is clearly established.[6]

A. Petitioners Have Established Standing Through Credible Threats and Chilling Effects

In affirming the district court's decision, the Ninth Circuit adopted an overly narrow interpretation of what constitutes a credible threat and ignored case law in which standing was satisfied because of the chilling effect of the law.

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6. Petitioners only need to show that one of them has standing to have the case go forward. "A proper case or controversy exists only when at least one plaintiff 'establish[es] that [she] ha[s] standing to sue'" (citations omitted). *Murthy,* 603 U.S. at 57.

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) affirms that a credible threat of enforcement can suffice to create constitutional standing, even if no enforcement action has been taken before the lawsuit. *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 302 (1979) makes the more specific point that "the presence of a law itself, if it has a demonstrable and immediate chilling effect on conduct, confers standing to challenge its constitutionality."

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) articulates the same point:

> We are not troubled by the preenforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

The Board's public statements related to the enforcement of the Federation's Covid misinformation press release, the passage of Section 2270, the statement by Section 2270's sponsor's spokesman, and the one known license surrender, together clearly manifest an intent to enforce the law, and that the threat is not hypothetical but real. In addition, there is nothing in the record disavowing future enforcement which exacerbates the chilling and self-censorship for some doctors.

As noted by Judge Kozinski in *Conant v. Walters*, 309 F.3d at 636 n.10, " . . . doctors are particularly vulnerable to intimidation; with little to gain and much to lose, only the most foolish or committed of doctors will defy the federal government's policy and continue to give candid advice about the medical use of marijuana."

Dr. Hoang and Dr. Tyson have explicitly declared their intention to continue advising patients on treatments that diverge from mainstream medical consensus, despite the potential repercussions under the current regulatory environment. Dr. Hoang's declaration specifically mentions her commitment to discussing the benefits and risks of off-label uses of medications for COVID-19, which she believes are in her patients' best interests but are frowned upon by the Board. Hoang Decl. ER 85. Dr. Tyson has detailed his practice of recommending nutritional supplements and alternative therapies, which, while beneficial, are often not supported by conventional medical authorities and could subject him to disciplinary actions. Tyson Decl. ER 86-87. These factual assertions, combined with the chilling effect of threatened enforcement of Section 2234(c), satisfy this Court's standing requirements.

B. The Lower Courts Erred in Requiring Petitioners to Conform to a Facial or As-Applied Statutory Challenge Which Led it to Erroneously Conclude There was No Standing

Both lower courts misconstrue this case as either a facial or as applied challenge to Section 2234(c). They both cite the basic requirement of injury-in-fact, threat of enforcement of Section 2234(c), and 1) whether there is a concrete plan to violate the law; 2) whether defendants have communicated a specific warning to

initiate proceedings against them; and 3) whether there is a history of past prosecutions. District court opinion at 22a. The Ninth Circuit agreed with the lower court that Petitioners showed none of those three circumstances in their "as applied" challenge to Section 2234(c). 4a.

However, this case is a challenge to California's three-year (and continuing) enforcement policy and program threatening physicians' fully protected speech. Reframing this case as merely a Section 2234(c) statutory challenge allowed both courts to exclude two of the most critical facts which establish the credible threat of enforcement and the reasonable fear that physicians who provide dissident information could face Board prosecution; that the California Covid misinformation program was a part of a larger national plan by the Federation to suppress the protected speech of physicians. Complaint, ER 107-108, para. 63.

And even more importantly, the current Section 2234(c) based enforcement program was just a tactical pivot from the same enforcement program utilizing the specific Covid misinformation law, AB 2098/Section 2270, which was repealed after it was enjoined by some of the Petitioners in this case. *Id*. at ER 109, para. 68 to ER 110, para 73. In short, the lower courts improperly narrowed the focus of this case to the application of a general statute to three physicians rather than the pleaded multiyear national enforcement policy, which in California resulted in a statute specifically targeting the same conduct as Section 2234(c) now targets.

In addition, neither decision acknowledges that courts possess the authority to strike down unconstitutional

policies, including informal or unwritten policies, irrespective of facial or as applied terminology.

In *Bantam Books, Inc. v. Sullivan* 372 U.S. 58 (1963), the Court addressed an informal censorship practice that was deemed unconstitutional. *See also Conant v. Walters*, 309 F.3d. 629 (9th Cir. 2002).[7] This expanded frame fits this Court's recent decision in *NRA v. Vullo*, 602 U.S. 175 (2024) which, although dealing with a Fed. R. Civ. P. 12(b)(6) motion, has on-point language about government coercion, threats and actions, creating a substantial and imminent risk of harm to constitutionally protected speech. Heavily relying on *Bantam Books*, in *Vullo*, the Court unanimously held that statements by a government official threatening private entities with adverse regulatory action if they failed to disassociate from a disfavored group constituted a sufficient basis for a First Amendment claim.

The threats in this case are direct, not third-party threats like in *NRA* and *Bantam Books* (or *Murthy* for that matter). That makes the coercion and threats more compelling for standing purposes than in *NRA* or *Bantam Books*.[8]

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7. There are many challenges to the practices and policies of the military. *See, e.g.*, *Wilkins v. United States*, 279 F.3d 782, 787 (9th Cir. 2002), citing numerous cases; *Rostker v. Goldberg,* 453 U.S. 57 (1981) (Equal Protection challenge to male-only draft registration). Petitioners have as much standing to challenge California's multi-year policy and program as any of the plaintiffs in these cases.

8. And unlike in *Murthy*, here, the Court has the power to grant meaningful relief because the Respondents are directly threatening the Petitioner physicians and other physicians.

C. The Organizational Petitioners Have Standing

Petitioners PIC and CHD assert their standing based on their right, and the right of their members, to receive information from physicians who are currently threatened by Respondents' enforcement threats. Complaint, ER 104-105, para. 47 for PIC, and ER 105 para. 50, lns. 21-23, and for both at ER 115, para. 92. Both organizations allege harms that directly parallel to harms recognized in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, where the Supreme Court held that a consumer organization had standing to challenge a law that restricted pharmacists from advertising prescription drug prices.

Like the plaintiff in *Virginia Bd. of Pharmacy*, PIC and CHD represent consumers of medical information, here viewpoint information (as opposed to the content only information in *Virginia Bd. of Pharmacy*). In both cases, organizations are suing health care boards for rendering content (or viewpoint) speech sanctionable as unprofessional conduct. Examples of the viewpoint speech targeted by the Respondents' program are extensively set out in the Complaint and the declarations, illustrating examples of the specific information which could subject physicians to disciplinary action for so called "Covid misinformation."[9]

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9. *See, e.g.*, the allegations of Petitioner PIC (Complaint, ER 102, para. 37 to ER 103, para. 41), CHD (ER 105-106, paras. 48-51). The information sought to be heard and protected is also found in the declarations of Petitioner physicians (Kory, ER 76-80; Hoang, ER 81-84; Tyson, ER 85-87) and further supported by the declarations of Neil Selfinger (ER 91-93) and Debbie Hobel (ER 88-90). Finally, the Verma declaration sets out much detailed viewpoint information from the medical literature which sought to be heard and protected when spoken by physicians. ER 39-75.

Finally, Petitioner Hoang is a member of organizational Petitioner PIC (Hoang Decl., ER 82 para. 2 lns. 7-8), which is more of a "connection" between the speaker and listener than the invited foreign speaker had to the university professor listeners in *Kleindienst v. Mandel*, 408 U.S. at 762. Hoang's connection to PIC should satisfy the *Mandel* connection requirement endorsed in *Murthy*.

In short, by restricting the speech of physicians, Respondents are also impairing the organizational Petitioners and their members' constitutionally protected right to hear or listen to this protected speech. The facts in this case satisfy the relaxed First Amendment standing requirements, and Petitioners' listener standing is supported by *Murthy*.

CONCLUSION

In the shifting winds of time, even in science and medicine, that which is reviled and ridiculed may become accepted, and the accepted may become disfavored. By reaffirming the Court's First Amendment protection of physicians' speech to patients, the Court protects current and future disfavored speech, making patients and the country better for it.

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2946

D.C. No. 2:24-cv-00001-WBS-AC

PIERRE KORY, M.D.; LE TRINH HOANG, D.O.; BRIAN TYSON, M.D.; PHYSICIANS FOR INFORMED CONSENT; CHILDREN'S HEALTH DEFENSE,

Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; REJI VARGHESE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA; ERIKA CALDERON, IN HER OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA,

Defendants-Appellees.

November 27, 2024, Filed

Appendix A

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted November 4, 2024
Pasadena, California

Before: SCHROEDER, W. FLETCHER, and CALLAHAN, Circuit Judges.
Concurrence by Judge CALLAHAN

MEMORANDUM[*]

Plaintiffs-Appellants are California physicians and non-profit organizations with which they are affiliated. They filed this 42 U.S.C. § 1983 action against the California Attorney General and the executive officers of the boards that regulate the medical profession in California. Pursuant to California Business & Professions Code § 2234(c), the boards are to take disciplinary action against physicians who engage in "unprofessional conduct" by deviating from the "standard of care." Plaintiffs raised First Amendment challenges to prevent any enforcement that might arise from Plaintiffs' expression of views regarding Covid-19 treatment and vaccination. The district court denied a preliminary injunction because Plaintiffs failed to establish a likelihood of success on either a facial challenge or a challenge to the statute as applied to Plaintiffs.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

To the extent that Plaintiffs on appeal seek to maintain a facial challenge, we must affirm, because the statute regulates conduct, not speech. *See Tingley v. Ferguson*, 47 F.4th 1055, 1072, 1074 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33, 217 L. Ed. 2d 251 (2023). It provides for enforcement of the standard of care, which is the standard for physicians' treatment of patients. *See Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142, 145 (Cal. 1994) (explaining that the standard of care creates requirements for "treatment of [the] patient" (citation omitted)). The statute does not purport to regulate speech unrelated to treating patients or require any particular communication. It is therefore unlike the statute in *National Institute of Family and Life Advocates v. Becerra*, which required communication of a particular message "regardless of whether a medical procedure [wa]s ever sought, offered, or performed." *See* 585 U.S. 755, 770, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018). Plaintiffs have not established any likelihood of success on a facial challenge, and in their reply brief and at oral argument, they have disclaimed pursuing one.

To establish standing for their as-applied challenge, Plaintiffs must show a credible threat that the Defendants will prosecute them under the statute. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014). None of the Plaintiffs have been prosecuted under the statute, and Defendants have not threatened enforcement against them. So far as the record discloses, the only disciplinary proceedings against a physician related to Covid-19 communications or treatment involved a physician encouraging her patient to

use veterinary ivermectin and resulted in the stipulated surrender of her license.

Plaintiffs nonetheless contend there is a threat that Defendants may prosecute them under the statute for making protected speech. To determine whether a purported threat is sufficient to establish an injury for Article III standing, we consider three factors: (1) whether Plaintiffs have a "'concrete plan' to violate the law"; (2) whether Defendants have "communicated a specific warning or threat to initiate proceedings" against them; and (3) whether there is a "history of past prosecution or enforcement." *See Tingley*, 47 F.4th at 1067 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). Plaintiffs have not shown that any of these factors are present here. The district court therefore correctly ruled Plaintiffs lack standing to bring an as-applied challenge to § 2234(c).

AFFIRMED.

Appendix A

CALLAHAN, Circuit Judge, Concurring in the Judgment:

I believe Plaintiffs have standing to bring an as-applied challenge, but concur in the judgment because Plaintiffs have not established a likelihood of success on the merits at this stage of the proceedings.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF CALIFORNIA, FILED APRIL 23, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:24-cv-00001 WBS AC

PIERRE KORY, M.D., LE TRINH HOANG, D.O., BRIAN TYSON, M.D., PHYSICIANS FOR INFORMED CONSENT, A NOT-FOR-PROFIT CORPORATION, AND CHILDREN'S HEALTH DEFENSE, A NOT-FOR-PROFIT CORPORATION,

Plaintiffs,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, REJI VARGHESE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MEDICAL BOARD OF CALIFORNIA, AND ERIKA CALDERON, IN HER OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA,

Defendants.

April 22, 2024, Decided
April 23, 2024, Filed

Appendix B

MEMORANDUM AND ORDER RE: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Pierre Kory, Le Trinh Hoang, Brian Tyson, Physicians for Informed Consent, and Children's Health Defense brought this § 1983 action against defendants Rob Bonta, in his official capacity as Attorney General of California, and Reji Varghese and Erika Calderon, in their official capacity as Executive Director and Executive Officer of the Medical Board of California and the Osteopathic Medical Board of California, respectively (the "Boards"). (Docket No. 1.) Plaintiffs Kory, Hoang, and Tyson are physicians licensed by the Boards. The remaining two plaintiffs are organizations representing the interests of doctors and patients.

Plaintiffs challenge the constitutionality of the Boards' powers to discipline physicians under Cal. Bus. & Prof. Code § 2234 for conveying COVID-19-related information to their patients.

I. Factual and Procedural Background

The court previously related this case to two cases that challenged the constitutionality of California's Assembly Bill ("AB") 2098: *Høeg v. Newsom*, 2:22-cv-1980 WBS AC, and *Hoang v. Bonta*, 2:22-cv-2147 WBS AC. (Docket No. 5.)

AB 2098, then codified at Cal. Bus. & Prof. Code § 2270 but since repealed, took effect on January 1, 2023. The statute provided that "[i]t shall constitute

unprofessional conduct for a physician and surgeon to disseminate misinformation . . . related to COVID-19, including false or misleading information regarding the nature and risks of the virus, its prevention and treatment; and the development, safety, and effectiveness of COVID-19 vaccines." Cal. Bus. & Prof. Code § 2270(a) (repealed 2024). The statute defined "misinformation" as "false information that is contradicted by contemporary scientific consensus contrary to the standard of care." *Id.* § 2270(b)(4). The statute augmented the definition of "unprofessional conduct," *id.* § 2270(a), which is a pre-existing basis for disciplinary action by the Boards, *see id.* § 2234.

This court preliminarily enjoined enforcement of AB 2098 against the *Høeg* and *Hoang* plaintiffs on January 25, 2023, on the ground that the law was unconstitutionally vague under the Fourteenth Amendment. See *Høeg v. Newsom*, 652 F. Supp. 3d 1172 (E.D. Cal. 2023).

The California Legislature subsequently repealed AB 2098, effective January 1, 2024. *See* Cal. Senate Bill 815 (Sept. 30, 2023). Both the Ninth Circuit and this court determined that the repeal of AB 2098 mooted actions challenging the statute. *See McDonald v. Lawson*, 94 F.4th 864, 870 (9th Cir. 2024); *Høeg*, 2024 U.S. Dist. LEXIS 60500, 2024 WL 1406591, at *1-2 (E.D. Cal. Apr. 2, 2024). This court therefore dismissed the *Høeg* and *Hoang* actions. *See id.* at *3. Plaintiffs filed this action, making similar First Amendment arguments to those raised (but not addressed by the court) in the *Høeg* and *Hoang* matters. While the *Høeg* and *Hoang* matters involved

First and Fourteenth Amendment challenges to AB 2098, the plaintiffs here bring a First Amendment challenge to the Boards' longstanding authority to discipline doctors under Business & Professions Code § 2234.

Plaintiffs now move for a preliminary injunction. (Docket No. 14.)

III. Preliminary Injunction Standard

To succeed on a motion for a preliminary injunction, plaintiffs must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011). "[I]njunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

III. Discussion

A. Regulation of Physicians and the First Amendment

"[R]egulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 771, 138 S. Ct. 2361, 201

L. Ed. 2d 835 (2018) ("*NIFLA*") (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). "[P]hysician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship." *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). Physicians "must be able to speak frankly and openly to patients," in part because "barriers to full disclosure would impair diagnosis and treatment." *Id.*

However, under longstanding Supreme Court precedent, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *See NIFLA*, 585 U.S. at 768; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) ("the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("words can in some circumstances violate laws directed not against speech but against conduct"). "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1053 (9th Cir. 2000) ("*NAAP*") (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)).

Physician conduct is no exception to this rule. Accordingly, the Supreme Court has explained that there

is "no constitutional infirmity" where a law "implicate[s]" a physician's First Amendment rights "only as part of the practice of medicine, [which is] subject to reasonable licensing and regulation by the State." *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (cited with approval in *NIFLA*, 585 U.S. at 769-70). "When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug." *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *abrogated on other grounds by NIFLA*, 585 U.S. 755. Indeed, "[m]ost, if not all, medical . . . treatments require speech, but that fact does not give rise to a First Amendment claim." *Id.*; *see also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007) ("The practice of medicine, like all human behavior, transpires through the medium of speech. In regulating the practice, therefore, the state must necessarily also regulate" the speech of physicians.).

1. Overview of Recent Cases

In *Pickup*, the Ninth Circuit analyzed the speech-conduct distinction in a case challenging Washington's law banning the practice of sexual orientation conversation therapy on children. The court stated that laws regulating the speech of health care professionals could be placed along a "continuum." *See* 740 F.3d at 1227. "At one end of

the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest." *Id.* "At the other end of the continuum . . . is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* at 1229 (emphasis added).

"At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished." *Id.* at 1228. As such, the Ninth Circuit explained, in that midpoint category of "professional speech," "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." *See id.* at 1229.

Applying these principles to the Washington law, the *Pickup* court concluded that the challenged law fell at the "conduct" end of the spectrum because it regulated a "form of treatment" and "[did] nothing to prevent licensed therapists from discussed the pros and cons of [conversion therapy] with their patients." *See id.* That "speech may be used to carry out" conversion therapy "[did] not turn the regulation of conduct into a regulation of speech." *Id.*

Four years later, in *NIFLA*, the Supreme Court considered a California law requiring so-called "crisis pregnancy centers" to make certain compelled disclosures. *See* 585 U.S. at 763-64. In analyzing the constitutionality of the law, the *NIFLA* court explicitly rejected *Pickup*'s continuum approach and delineation of "'professional speech' as a separate category of speech that is subject

to different rules." *See id.* at 767. The Court stated that its "precedents do not recognize [a tradition of allowing content-based restrictions] for a category called 'professional speech,'" but reiterated the longstanding rule—relied upon by the *Pickup* court—that "States may regulate professional conduct, even though that conduct incidentally involves speech." *See id.* at 768.

In *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33, 217 L. Ed. 2d 251 (2023), the Ninth Circuit considered a challenge to a California law banning conversion therapy that was functionally identical to the one considered in *Pickup*. The case gave the Ninth Circuit occasion to consider what effect *NIFLA* had on *Pickup*. The court concluded that "*NIFLA* abrogated only the 'professional speech' doctrine—the part of *Pickup* in which we determined that speech within the confines of a professional relationship" (the "theoretical 'midpoint' of the continuum") receives decreased scrutiny. *See id.* at 1073, 1075.

However, the *Tingley* court determined that "the conduct-versus-speech distinction from *Pickup* remains intact" post-*NIFLA*. *See id.* at 1055. *NIFLA* therefore did not abrogate *Pickup*'s analysis of the Washington conversion therapy law, which fell within the category of professional *conduct*. *See id.* at 1077.

Following *NIFLA* and *Tingley*, then, a court's task in analyzing a regulation of physicians under the First Amendment is to determine whether the law at issue regulates physician speech, in which case it is subject to

strict scrutiny; or regulates physician conduct, in which case it is not constitutionally suspect and subject to rational basis review. *See NIFLA*, 585 U.S. at 767; *Tingley*, 47 F.4th at 1072, 1078.

2. Physician Conduct Versus Physician Speech

As a representative example, Dr. Kory avers that he provides consultations during which he addresses patient "questions and concerns" about ivermectin for the treatment of COVID-19, including "whether he recommends its use." (Verified Compl. (Docket No. 9) ¶ 19.)[1] Relying on *Conant*, plaintiffs argue that this type of consultation is protected physician speech.

In *Conant*, the Ninth Circuit addressed the constitutionality of a federal policy of "investigating doctors or initiating proceedings against doctors only because they 'recommend' the use of marijuana." 309 F.3d at 634. This policy was grounded in marijuana's classification as a controlled substance, which barred doctors from prescribing marijuana in any circumstance. *See id.* at 632-34. The Ninth Circuit concluded that the policy violated the First Amendment because it "punish[ed] physicians on the basis of the content of doctor-patient communications." *See id.* at 637.

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1. While plaintiffs make numerous contentions concerning the efficacy of ivermectin in treating COVID-19, the court's task here is not to determine the legitimacy of any medical treatment.

In coming to this conclusion, the Ninth Circuit pointed out the distinction between a "recommendation" untethered from treatment of a patient, and a "recommendation [that] the physician intends for the patient to use . . . as the means for obtaining marijuana." *See id.* at 635. The former is speech, while the latter is regulable conduct—akin to a doctor's "prescription" of a drug—that could lead to criminal liability for aiding and abetting the patient's violation of federal law. *See id.* at 635-36. As the *Pickup* court explained, *Conant* indicates that "doctor-patient communications about medical treatment receive substantial First Amendment protection, [while] the government has more leeway to regulate the conduct necessary to administering treatment itself." *See* 740 F.3d at 1227.

It was not, as plaintiffs seem to suggest, the use of the word "recommendation" that was dispositive in *Conant*. If that were the case, doctors could frame their treatment as "recommendations" to shield themselves from regulation. Instead, it was the relationship of the doctors' marijuana recommendation to *treatment* that mattered. *See Conant*, 309 F.3d at 635-36; *Pickup*, 740 F.3d at 1227; *see also Rumsfeld v. F. for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

It is important to note the specific context presented by *Conant* where, by legal necessity, any physician's "recommendation" of marijuana was entirely disconnected

from the physician's treatment of the patients. This is because to treat a patient with marijuana was illegal and would have subjected the physician to criminal liability (which the parties agreed was not constitutionally problematic). *See* 309 F.3d at 634-35; *see also Pickup*, 740 F.3d at 1229 (explaining that the policy at issue in *Conant* "prohibited speech *wholly apart* from the actual provision of treatment") (emphasis in original). Thus, in *Conant*, it was simple for the Ninth Circuit to create a clear "demarcation between conduct and speech." *See Pickup*, 740 F.3d at 1226 (citing *Conant*, 309 F.3d at 632, 635-36); *see also Conant*, 309 F.3d at 635 (indicating that the injunction upheld on review drew a "clear line between protected medical speech and illegal conduct").

Most situations in medical practice are not so clear-cut. Within the same patient conversation, a doctor could go from (1) speaking about his views on a particular treatment based on his experience and expertise, to (2) prescribing the use of that treatment for the patient's care. The former would be speech, while the latter would be conduct. This is because the "key component" of a doctor's prescription of a drug is the provision of the drug, not the speech itself. *See NAAP*, 228 F.3d at 1054. And "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone." *Pickup*, 740 F.3d at 1230. Thus, when a doctor speaks in his capacity as the patient's *treating* physician and *incident to his provision of medical care*, the physician's words constitute regulable conduct.

Returning to the situation posed by Dr. Kory, his discussion with a patient of the "pros and cons" of ivermectin and a statement that he generally recommends the use of that treatment for COVID-19 could be considered speech. *See Conant*, 309 F.3d at 634; *see also Pickup*, 740 F.3d at 1229 (law banning conversion therapy was constitutional in part because it "allow[ed] discussions about treatment, recommendations to obtain treatment, and expressions of opinions about" treatment). If Dr. Kory were to prescribe the medication, instruct the patient to take the medication, or otherwise use words to treat the patient—for example by saying, "I recommend that you take 10 milligrams of ivermectin once a day for seven days"—Dr. Kory's words could constitute conduct regulable by the state, as his speech was incident to his treatment of the patient.[2] *Cf. Conant*, 309 F.3d at 635-36 (indicating that when a "physician intends for the patient to use [his recommendation] as the means for obtaining" an illegal drug, the recommendation of the drug can be considered criminal conduct).

The court recognizes that the distinction between physician speech and conduct may be subtle at times. Nonetheless, "[w]hile drawing the line between speech and conduct can be difficult, [the Supreme Court's] precedents have long drawn it." *NIFLA*, 585 U.S. at 769.

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2. The court again emphasizes that it takes no position on the propriety of using ivermectin to treat COVID-19. It only concludes that, in the example raised by plaintiffs, treating a patient with ivermectin falls within the bounds of "conduct" that the state may permissibly regulate.

B. Section 2234(c) Is a Facially Constitutional Regulation of Physician Conduct

California Business & Professions Code § 2234 grants the Boards authority to "take action against any licensee who is charged with unprofessional conduct." Unprofessional conduct includes, but is not limited to, incompetence, gross negligence, and repeated negligent acts. Id. Plaintiffs seek to enjoin enforcement of section 2234(c) pertaining to "repeated negligent acts," which are defined as "[a]n initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care." *Id.* § 2234(c).[3] Plaintiffs argue that the Boards will impermissibly use section 2234(c) to discipline physicians for constitutionally protected doctor-patient communications concerning COVID-19.

The statute is neutral on its face and applies broadly to the practice of medicine by all doctors. It does not discriminate between different types of content or speakers and is therefore not a content-based regulation requiring the application of strict scrutiny. *See NIFLA*, 585 U.S. at 766 (content-based regulations are those that "target speech based on its communicative content"); *see also NAAP*, 228 F.3d at 1055 ("California's [psychoanalyst]

3. Plaintiffs state that they seek to enjoin the entirety of section 2234. However, their arguments appear only to address section 2234(c), and plaintiffs' counsel admits that he "has not identified any other provision of the Business and Professions Code which could be utilized by the board as an alternative" basis for discipline. (*See* Docket No. 18 at 10.) The court therefore construes plaintiffs' motion as a challenge to section 2234(c).

licensing scheme is content and viewpoint neutral; therefore, it does not trigger strict scrutiny.").

Further, the plain language of the statute—which uses the terms "unprofessional conduct" and "act or omission"—clearly contemplates disciplinary action for conduct, not speech. The statute's reference to the standard of care makes this plain as, by its very nature, the standard of care applies to *care*, not speech. *See Alef v. Alta Bates Hosp.*, 5 Cal. App. 4th 208, 215, 6 Cal. Rptr. 2d 900 (1st Dist. 1992) (the standard of care determines "the minimum level of *care* to which the patient is entitled") (emphasis added). The statute is therefore a regulation of professional conduct with only an incidental effect on speech, if any. *See NIFLA*, 585 U.S. at 768; *Casey*, 505 U.S. at 884.

Because section 2234(c) regulates conduct, it need only satisfy rational basis review. *See Tingley*, 47 F.4th at 1078. Under this standard, a law need only be "rationally related to a legitimate state interest" to pass constitutional muster. *See id.* Section 2234(c) easily satisfies that standard.

A state has "a 'compelling interest in the practice of professions within [its] boundaries.'" *Tingley*, 47 F.4th at 1078 (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)). A state also has an interest in regulating health care providers to protect patient health and safety. *See Gonzales v. Carhart*, 550 U.S. 124, 166, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007); *NAAP*, 228 F.3d at 1054. The requirement that doctors provide appropriate care is plainly related to advancing those interests.

Indeed, as the Supreme Court has explained:

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health. . . . It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection.

Barsky v. Bd. of Regents of Univ. of State of N.Y., 347 U.S. 442, 451, 74 S. Ct. 650, 98 L. Ed. 829 (1954). Accordingly, state "health and welfare laws" are "entitled to a 'strong presumption of validity.'" *See Dobbs*, 597 U.S. at 301 (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)); *see also Conant*, 309 F.3d at 639 (federal courts should respect the "principles of federalism that have left states as the primary regulators of [health professionals'] conduct"); *NAAP*, 228 F.3d at 1054 (citing *Watson v. Maryland*, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987 (1910)) ("It is properly within the state's police power to regulate and license professions, especially when public health concerns are affected.").

For the foregoing reasons, the court concludes that section 2234(c) is a facially constitutional regulation of physician conduct.

C. Plaintiffs' Have Not Established Standing to Bring an As-Applied Challenge to Board Enforcement

Because section 2234(c) is a regulation of physician conduct, Board discipline of protected speech would be, by definition, outside the scope of 2234(c). To obtain an injunction, plaintiffs would therefore need to mount an as-applied challenge to some policy or practice of disciplining physician speech by the Boards. However, plaintiffs have failed to establish standing to challenge any such policy or practice.[4]

Article III standing has three elements: "(1) injury-in-fact—plaintiff must allege concrete and particularized and actual or imminent harm to a legally protected interest; (2) causal connection—the injury must be fairly traceable to the conduct complained of; and (3) redressability—a favorable decision must be likely to redress the injury-in-fact." *Barnum Timber Co. v. U.S. EPA*, 633 F.3d 894, 897 (9th Cir. 2011) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) (internal quotation marks omitted).

"[A] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible

4. Although defendants did not expressly argue that plaintiffs lack standing, the court nonetheless has a duty to evaluate Article III standing. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002).

threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). The Ninth Circuit applies a "three-factor inquiry to help determine whether a threat of enforcement is genuine enough to confer an Article III injury": "(1) whether the plaintiff has a 'concrete plan' to violate the law, (2) whether the enforcement authorities have 'communicated a specific warning or threat to initiate proceedings,' and (3) whether there is a 'history of past prosecution or enforcement.'" *Tingley*, 47 F.4th at 1067 (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). "'Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution' satisfies this test." *Id.* (quoting *Thomas*, 220 F.3d at 1139).

Challenges that involve First Amendment rights "present unique standing considerations" because of the "chilling effect of sweeping restrictions" on speech. *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). "In order to avoid this chilling effect, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (internal quotation marks omitted). Accordingly, when the challenged law "implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000).

Nonetheless, a plaintiff challenging a law on First Amendment grounds must still demonstrate that "there exists a credible threat of prosecution thereunder." *See Susan B. Anthony List*, 573 U.S. at 159; *see also Italian Colors Rest.*, 878 F.3d at 1171 ("Even in the First Amendment context, a plaintiff must show a credible threat of enforcement.").

Plaintiffs have failed to make the necessary showing, as the record is utterly devoid of any evidence that the Boards have or may use their authority under section 2234(c) to do anything other than regulate physician conduct, let alone discipline physicians for their protected speech in the manner plaintiffs suggest.

1. Threat of Enforcement

To show that authorities have communicated a threat of enforcement, plaintiffs point to a statement allegedly made by Assemblyman Evan Low (a sponsor of AB 2098) following the repeal of AB 2098. Low purportedly stated that, despite the law's repeal, "the Medical Board of California will continue to maintain the authority to hold medical licensees accountable for deviating from the standard of care and misinforming their patients about COVID-19 treatments." (*See* Verified Compl. ¶ 73.) Assuming that Mr. Low, in fact, made that statement (which plaintiffs have not established)[5], it provides no support for

5. The statement was provided by plaintiffs only in the form of an unsupported allegation. (*See* Verified Compl. ¶ 73.) However, the court was able to locate a Los Angeles Times article containing the quote from Assemblyman Low. *See* Corinne Purtill, *Controversial*

plaintiffs' argument. Mr. Low is not a defendant in this action. And the pronouncement of a politician, without more, does not indicate that the Boards—administrative agencies that operate independently of the California Legislature—will apply the law in any particular way. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 605, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (explaining that so-called "postenactment legislative history" is not legislative history at all and is not a proper interpretive tool); *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 297, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010) ("a single sentence by a single legislator" is not "entitled to any meaningful weight"); *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) ("Attributing the actions of a legislature to third parties rather than to the legislature itself is of dubious legitimacy, and the cases uniformly decline to do so."); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 69 (2d Cir. 1999) (the actions of legislators who "cajole" and "exhort" agencies concerning administration of a statute are "political rather than legislative in nature"); *Goolsby v. Blumenthal*, 581 F.2d 455, 460 (5th Cir. 1978), *on reh'g*, 590 F.2d 1369 (5th Cir. 1979) (quoting *Reg'l Rail Reorg. Act*

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law punishing doctors who spread COVID misinformation on track to be undone, Los Angeles Times (Sept. 11, 2023). The court takes judicial notice of the fact that said quote was attributed to Mr. Low "in the public realm at the time" but expresses no opinion about "whether the contents of th[e] article[ ] were in fact true." *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

Cases, 419 U.S. 102, 132, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)) ("post-passage remarks of legislators . . . 'represent only the personal views of these legislators'").

To establish a history of prior enforcement, plaintiffs point to the alleged Board discipline of a physician who is not a plaintiff in this action, Dr. Ana Reyna, for her provision of certain COVID-19-related information and opinions. However, plaintiffs provide nothing more than bare, unverified allegations concerning the basis for Dr. Reyna's Board discipline. (*See* Verified Compl. ¶¶ 21, 74.) The only evidence before the court concerning Dr. Reyna shows that she surrendered her license following the commencement of disciplinary proceedings. (*See id.*) Because plaintiffs have not provided (and the court was unable to locate) evidence regarding the basis for the disciplinary action, the court disregards these allegations.

Finally, plaintiffs rely on the administrative and legislative history related to AB 2098 to demonstrate that their desired speech concerning COVID-19 is proscribed by Board policy. But this case pertains to section 2234, not the now-repealed AB 2098. Plaintiffs have provided no evidence that the Boards have or will treat the repeal of AB 2098—along with this court's preliminary injunction order and the Ninth Circuit panel's skepticism of the law during oral argument on the *McDonald* appeal[6]—as anything other than a mandate to refrain from improper regulation of doctors' speech. *See Rosebrock v. Mathis*,

6. *See* Oral Argument at 18:16—31:00, *McDonald v. Lawson*, 94 F.4th 864, No. 22-56220 (9th Cir. 2023), https://www.ca9.uscourts.gov/media/video/?20230717/22-56220/.

745 F.3d 963, 971 (9th Cir. 2014) ("We presume that a government entity is acting in good faith when it changes its policy."). Indeed, defendant Varghese stated in his capacity as Executive Director of the Medical Board that, following the passage of the repeal bill, AB 2098 would not be enforced even while it was still in effect. *See McDonald*, 94 F.4th at 869.

Accordingly, the court concludes that plaintiffs have failed to establish that there is any threat the Boards will enforce section 2234(c) or otherwise discipline physicians in a manner that implicates their protected speech.

2. COVID-19 and the Standard of Care

Plaintiffs additionally argue that they face a risk of discipline for any care provided to treat COVID-19 because "there is no legitimate [COVID-19] standard of care." (*See* Docket No. 14 at 13.) In support of that argument, they cite the declaration they relied upon in *Hoang v. Bonta* (*see Hoang* Docket No. 4-2) and a declaration filed in this matter providing additional information and scientific updates (*see Kory* Docket No. 14-1). The declarations, authored by Dr. Sanjay Verma and not objected to by defendants, explain the various ways in which the scientific evidence on COVID-19 has changed over time and remains contested. They also explain several ways in which the pronouncements of public health authorities concerning COVID-19 have vacillated, at times to the point of either inconsistency with scientific evidence or direct contradiction of prior recommendations.

For example, Dr. Verma points out that at the beginning of the pandemic, the CDC represented that cloth masks prevented COVID-19 transmission and recommended their use among the general population. (*See Hoang* Decl. ¶¶ 13-18; Appendix 1 to *Hoang* Decl.) Later, scientific studies showed that cloth masks were not effective at preventing the spread of COVID-19, and the CDC eventually changed its recommendation concerning their use. (*See id.*) As another example, Dr. Verma avers that the CDC continues to recommend that the general population keep "up to date" on COVID-19 vaccines and boosters, despite studies showing dwindling vaccine efficacy and the potential for serious side effects. (*See Kory* Decl. ¶¶ 39-46.) From such changes, disagreement, and inconsistencies, plaintiffs make the logical leap that there is no standard of care for COVID-19 treatment, placing them at risk of discipline for all COVID-19-related care.

The court can understand plaintiffs' frustration over the various discrepancies and shifts in recommendations concerning COVID-19. And the inconsistencies apparent in many of those recommendations unfortunately do not reflect well on the credibility of those who made them. However, it simply does not follow that there is no standard of care applicable to COVID-19. It cannot be the case that scientific disagreement and inconsistencies in public health recommendations exempt doctors from the requirement that they adhere to the standard of care.

The standard of care is a well-established legal concept, "requir[ing] that medical service providers

exercise that degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances." *See Barris v. County of Los Angeles*, 20 Cal. 4th 101, 108, 83 Cal. Rptr. 2d 145, 972 P.2d 966 (1999). As defendants point out, this standard, in one formulation or another, has governed the practice of medicine for centuries. *See* Robert I. Field, *The Malpractice Crisis Turns 175: What Lessons Does History Hold for Reform*?, 4 Drexel L. Rev. 7, 10 (2011) ("[t]he earliest lawsuits for medical mistakes date back several centuries to the formative stages of the common law," with the "first reported case . . . decided in 1374"); *see also Arnett v. Dal Cielo*, 14 Cal. 4th 4, 7, 56 Cal. Rptr. 2d 706, 923 P.2d 1 (1996) ("[s]ince the earliest days of regulation," the California medical boards "have been charged with the duty to protect the public against incompetent, impaired, or negligent physicians"). The application of a professional standard of practice is hardly unique to the healthcare context. *See, e.g., Gunn v. Minton*, 568 U.S. 251, 264, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013) (indicating that states have "a special responsibility for maintaining standards among members of the licensed professions," including through the imposition of standards of practice for lawyers) (internal quotation marks and citations omitted).

"The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it . . . can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman." *Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 8 Cal. 4th 992, 1001, 35 Cal. Rptr. 2d 685, 884 P.2d 142 (1994).

(*See also* Calderon Decl. (Docket No. 17-1) ¶¶ 6-7, Varghese Decl. (Docket No. 17-2) ¶¶ 5-6 (explaining that when the Boards investigate a physician, a "medical consultant . . . examines the medical record and any additional evidence to determine whether there is a potential violation of the standard of care," in which case the matter is subject to further review by a "retained outside medical expert"). Importantly, because determination of the appropriate standard of care "is *inherently situational*, the amount of care deemed reasonable in any particular case will vary." *Flowers*, 8 Cal. 4th at 997 (emphasis added). No court could make a broad pronouncement about the standard(s) of care applicable to an entire disease—which can present a vast range of clinical presentations and possible treatment options—let alone conclude that no such standard exists.

That the standard of care remains in force in the COVID-19 context is supported by common sense. Although there may be areas of uncertainty when it comes to COVID-19, there are nonetheless types of treatment that are clearly not permissible. As a purely hypothetical example, if a doctor were to order a patient under his care to drink a gallon of industrial rat poison to treat COVID-19, no one could argue that would be consistent with the standard of care. To conclude otherwise would interfere with the State's appropriate exercise of its authority to ensure that patients are protected from "charlatan[s]" masquerading as professionals. *See Pickup*, 740 F.3d at 1228.

Seeking to brush aside the centuries-long regulation of the medical profession, plaintiffs seem to conflate

the standard of care with the vague notion of "scientific consensus." Their argument is premised on this court's prior finding that COVID-19 was "a quickly evolving area of science that in many aspects eludes consensus," and therefore the term "scientific consensus" was unconstitutionally vague. *See Høeg*, 652 F. Supp. 3d at 1188. While the concept of a "consensus" among the medical community may be related to the standard of care, the terms are not interchangeable. And as indicated above, plaintiffs have not offered any evidence that, following the repeal of AB 2098, the Boards will discipline doctors in a manner that conflates the two.

Plaintiffs also appear to treat the standard of care as a rigid benchmark that cannot countenance reasonable medical disagreement. To the contrary, the standard of care can and does account for differing views among medical professionals. *See McAlpine v. Norman*, 51 Cal. App. 5th 933, 938-39, 264 Cal. Rptr. 3d 755 (3d Dist. 2020) (indicating that the standard of care in a medical malpractice action is routinely determined based on "competing expert testimony"); *Blackwell v. Hurst*, 46 Cal. App. 4th 939, 944, 54 Cal. Rptr. 2d 209 (2d Dist. 1996) ("a difference of medical opinion concerning the desirability of a particular medical procedure when several are available does not establish that the one used was negligent"); *Glover v. Bd. of Med. Quality Assurance*, 231 Cal. App. 3d 203, 208, 282 Cal. Rptr. 137 (1st Dist. 1991) ("As long as the differences of opinion [on the standard of care] are legitimate, we have no dispute with the notion that different methods of treatment can all be considered acceptable medical practice."); *Fraijo v. Hartland*

Hosp., 99 Cal. App. 3d 331, 343, 160 Cal. Rptr. 246 (2d Dist. 1979) (a physician's "error in medical judgment" in selecting among treatment options is not automatically considered negligent, but rather is "weighed in terms of the professional standard of care"); *Gearhart v. United States*, No. 15-cv-665 MDD, 2016 U.S. Dist. LEXIS 77371, 2016 WL 3251972, at *9 (S.D. Cal. June 14, 2016) ("Under California law, a mere difference of medical opinion is insufficient evidence to support a finding of negligence.").

"Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *NIFLA*, 585 U.S. at 772. "Only rarely does the physician enjoy true certainty regarding any issue." 1 Am. Law Med. Malp. § 3:8. Disagreement between competent medical professionals on the best course of treatment for a given condition is common, and there is not necessarily any violation of the standard of care in those circumstances. *See id.* § 3:3 ("Within certain clinical settings, there may be reasonably applicable alternative methods of diagnosis or treatment. A physician choosing one or the other method would not violate a 'standard' of good medical practice."); *see also* Philip G. Peters, Jr., *Doctors & Juries*, 105 Mich. L. Rev. 1453, 1477 (2007) ("when researchers ask physicians to rate the quality of care provided by other physicians, the participants disagree among themselves" at a "surprisingly high" rate, as "[r]easonable professionals often reach different conclusions about the same evidence"); Peter D. Jacobson & Stefanie A. Doebler, "*We Were All Sold A Bill of Goods:*"

Litigating the Science of Breast Cancer Treatment, 52 Wayne L. Rev. 43, 79 (2006) (in evaluating whether a novel treatment option comports with the standard of care, part of a court's task is to determine "when the widespread disagreement among qualified medical experts over whether the treatment or procedure at issue has crossed the line from being an experimental procedure to become an acceptable medical practice"); James Ducharme, *Clinical Guidelines and Policies: Can They Improve Emergency Department Pain Management*?, 33 J.L. Med. & Ethics 783, 786 (2005) ("If there is more than one recognized course of treatment, most courts will allow some flexibility in what is regarded as customary."); Joan P. Dailey, *The Two Schools of Thought and Informed Consent Doctrines in Pennsylvania: A Model for Integration*, 98 Dick. L. Rev. 713, 714 (1994) ("Courts have long recognized that medicine is not an exact science and that therefore physicians are bound to disagree over the propriety of various treatments.").

Even medical approaches that are in the minority can be considered within the standard of care. *See* 1 Am. Law Med. Malp. § 3:3 ("What is custom and practice in the medical profession is usually a reliable measure of due care. However, that is not always the case.") (citing *Texas & P. Ry. Co. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905 (1903)). It could even be considered a violation of the standard of care to continue using a long-established treatment if a doctor failed to remain informed of advances in medical knowledge. *See id.* ("The standard

of care clearly requires a doctor to keep up to date and abreast of changes.").[7]

As the Supreme Court has stated, states have "wide discretion to [regulate] areas where there is medical and scientific uncertainty." *See Gonzales*, 550 U.S. at 163. COVID-19 is far from the first medical topic to prompt controversy and serious disagreement among doctors and scientists. *See, e.g., Conant*, 309 F.3d at 643 (Kozinski, J., concurring) (describing the "genuine difference of expert opinion on the subject [of medical marijuana], with significant scientific and anecdotal evidence supporting both points of view"); Caroline Lowry, *Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims As A Vehicle for Gender Justice*, 52 Colum. J.L. & Soc. Probs. 321, 339 (2019) ("[t]he standard of care for treating intersex individuals is controversial and ever-changing" due in part to "sparse and incomplete" research on the topic); Katherine Goodman, *Prosecution of Physicians As Drug Traffickers: The United States' Failed Protection of Legitimate Opioid Prescription*

7. Indeed, California law recognizes that medical science is frequently changing and can offer worthwhile treatments that are not broadly accepted. The California Right to Try Act, Cal. Health & Safety Code § 111548, provides that a patient with a life-threatening disease who has considered all available FDA-approved treatment options and is unable to participate in an applicable clinical trial has the right to undergo an "investigational" treatment recommended by his physician, *see id.* § 111548.1(b). A physician is immune from Board discipline for prescribing investigational treatments under those circumstances, when carried out in accordance with the procedural protocol established by the relevant Board. *See id.* § 111548.3(a).

Appendix B

Under the Controlled Substances Act and South Australia's Alternative Regulatory Approach, 47 Colum. J. Transnat'l L. 210, 226-27 (2008) ("physicians widely disagree about the propriety of administering narcotics for short-term pain or to addicts, and there is little agreement about the addiction risks that narcotics present" and "the maximum thresholds for high-dose opioid therapy"). It would be absurd to conclude that the State forfeits its broad authority to regulate the practice of medicine whenever such disagreement is present.

For the court to conclude that no standard of care exists in the realm of COVID-19 would create an unprecedented exception to the long-established regulatory paradigm governing medical professionals. Such a conclusion would also functionally exempt doctors from both private malpractice actions and disciplinary proceedings under section 2234(c) whenever they provide care in connection with that disease, placing the public at risk of harm without recourse or adequate oversight.

Because plaintiffs have failed to establish a likelihood of success on the merits of their First Amendment challenge to California Business & Professions Code § 2234, IT IS HEREBY ORDERED that plaintiffs' motion for preliminary injunction (Docket No. 14) be, and the same hereby is, DENIED.

Dated: April 22, 2024

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE